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Marine Pollution, Admiralty and State Police Power: A Primer on BP Oil Spill Choice of Law Issues Under The Oil Pollution Act of 1990

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I. Introduction

Fish or ducks? Figures ascending, descending or vanishing into the void?

The prints of M.C. Escher, the enigmatic Dutch graphic artist, caution us that how we understand what we see turns as much on the perspective used to untangle a complex field as on its objective structure. What we select as the foreground largely conditions the significance we assign to objects or patterns we place in the background.

The multiple pathways confronting the threshold choice of law issues posed by BP oil spill litigation rival Escher's prints in their complexity. His three spatial dimensions reappear in the three forces competing for the oil spill picture's foreground: admiralty and general maritime law, the states' retained police powers, and federal environmental/pollution legislation.

For at least half of the last century, the foreground was largely ceded to admiralty and general maritime law.1 The impetus for robust federal environmental and pollution control initiatives lay in the future with Torrey Canyon, the Santa Barbara well blowout, and, of course, Exxon Valdez.

Southern Pacific Co v. Jensen2 rendered state legislative initiatives impinging on maritime commerce vulnerable to preemption as measures threatening the uniformity of admiralty law, although some state incursions were allowed under the "maritime but local" exception. In a dramatic turnabout, the United States Supreme Court's 1972 decision, Askew v. American Waterways Operators, Inc.,3 deflated Jensen's outsized preemption objection by endorsing the states' concurrent authority to regulate maritime pollution alongside similar federal measures rooted in the admiralty or commerce clauses.

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2 244 U.S. 205 (1917).
Federal environmental/pollution legislation staked its claim for the foreground with the 1972 and 1976 amendments to the 1970 Federal Water Pollution Control Act,4 and, of special note for this paper, the 1953 Outer Continental Shelf Lands Act (OCSLA).5

Congress returned to the latter in 1978 to elevate the prevention of maritime pollution as a primary OCSLA value alongside its prior goals of delimiting exclusive federal sovereignty and jurisdiction over the Outer Continental Shelf (OCS); authorizing the leasing of OCSLA sites for mineral production; and endowing the Department of Interior broad administrative and rule-making powers over the OCS leasing program.

Responding to environmentalists’ successful use of the National Environmental Policy Act to block the federal government’s leasing of OCS sites for oil and gas development, Congress sought a greater balance between increasing the nation’s energy output and the states’ insistence on protecting their coastlines and citizens from the environmental and economic damages wrought by oil spills and well blowouts.6

OCSLA Sec. 1331(5), for example, defines an “affected state” as one in which development of OCS oil and gas poses a “significant risk of serious damage ... to the marine or coastal environment in the event of any oil spill, blowout, or release of oil or gas ....”7 Other amendments extend the coverage of the Constitution and United States laws beyond fixed platforms to “all installations and other devices permanently or temporarily attached to the [OCS] seabed”;8 authorize the Secretary to suspend or cancel oil leases in the face of threats of environmental damage;9 increase the participation of the states in planning and leasing decisions;10 integrate into OCSLA’s text the environmental protections

4 33 U.S.C. 1321.
5 43 U.S.C. Sec. 1331.
6 Senator Metzenbaum voiced the views of the chairs of the principal Senate and House Committee Chairs and the then-Secretary of the Interior in his observation that
[O]ne of the most important [issues being addressed in the 1978 amendments] is the protection of America’s marine and coastal environments. Concern over recent tanker oil spills, has heightened the public concern on this issue. In recognition of this vital national concern, a major thrust of S.9 is the environmental protections which must go hand in hand with the development of the valuable oil and gas reserves on the Outer Continental Shelf. Hearings before the Ad Hoc Committee on Outer Continental Shelf on HR 1614, Part 2, at pp. 873-74 (March 15, 1977).
7 OCSLA Sec. 1331(f) (5).
8 OCSLA 1333(a) (1). This change’s purpose, according to the Conference Report, insures that “federal law is to be applicable to all activities on all devices in contact with the [OCS] seabed for exploration, development and production,” thereby bringing within OCSLA’s coverage both fixed and mobile drilling platforms.”
9 OCSLA Sec.1344.
10 OCSLA Sec. 1345.
afforded by the Coastal Zone Management Act\textsuperscript{11} and National Environmental Policy Act;\textsuperscript{12} require DOI to conduct environmental studies addressing impacts on marine biota from pollution or large spills;\textsuperscript{13} and add a citizen suit provision to the act.\textsuperscript{14}

The President’s Deepwater Horizon Commission\textsuperscript{15} recently affirmed that balancing energy production with pollution prevention and environmental values is even more imperative today:

Offshore wells yield one-third of current U.S. oil production. . . . That already-crucial role is likely to increase. The area of federal jurisdiction, the outer continental shelf, contains an estimated 85 billion barrels of oil in technically recoverable resources — more than all onshore resources and those in the shallower state waters combined. The future of domestic oil production will rely to a substantial extent on current outer continental shelf resources and

\textsuperscript{11} OCSLA Sec. 1351.
\textsuperscript{12} OCSLA Sec. 1345.
\textsuperscript{14} OCSLA Sec. 1349. Title III of the amendments set forth an oil pollution liability and compensation regime that substantially anticipated Title I of the Oil Pollution Act of 1990. In fact, Title III served as a placeholder for the later regime. See Conference Report No. 1031, p. 48 ("It is hoped . . . that such a comprehensive bill will soon be enacted that thus obviates the need for this title."). The title defines "oil pollution," the event upon which strict liability is imposed, as the unlawful presence of oil in waters ranging from state coastlines to the contiguous zone. Title III, Sec. 309(1). The term "vessel" is narrowly defined to include only "a watercraft or other contrivance... which is transporting oil directly from an offshore facility." Id. at Sec. 301(5). An "offshore facility," in contrast, may also include vessels in the form of "any drilling structure ... which is used to drill for, produce, ... or transport oil produced from the [OCS]." Id at 301(4). The term "incident" encompasses "any occurrence or series of related occurrences, involving one or more offshore facilities or vessels, or any combination thereof, which cause: or poses an imminent threat of oil pollution." Id. at 301(4). With OPA’s enactment, Congress repealed Title III, incorporating many of its principal features into the latter statute’s Title I.

Title III’s pollution liability scheme is straightforward: liability is imposed on drilling vessel and offshore facility owners and operators (including those owning or operating semi-submersibles and other drilling structures temporarily installed on the OCS seabed). Liability is occasioned by spills that create oil pollution in an area running from state coastlines to and in some cases beyond United States territorial seas. Oil pollution events may include either single or multiple vessels or offshore facilities engaged in a single or related series of operations.

further development of deposits there — in progressively deeper, more distant waters ....” 16

The more comprehensive pollution prevention, response, and liability act that the drafters of OCSLA's 1978 amendments awaited was stalled in the face of energy industry and Republican Administration resistance. The Exxon Valdez disaster, however, shocked the nation on March 4, 1989. The Oil Pollution Act of 1990 became law on August 1, 1990.

An ambitious child of its predecessors, OPA consolidates environmental and pollution prevention within a comprehensive legislative framework. A dutiful child, OPA bowed to its legislative predecessors by incorporating and expanding their endorsement of pollution prevention, remediation, and discharger liability as OPA's overriding goals. Pervasive anxiety appears throughout the Senate, House and Conference Reports over future catastrophes scaled at the Exxon Valdez level. Illustrative is commencement of the Senate Report with an expression of concern “with the potential environmental dangers posed by the transfer, storage and handling of oil,” 17 and its subsequent warning of the “potential for future catastrophic oil spills and the need to prevent such pollution and minimize its damage.” 18

With the 1972 FWPCA and 1978 OCSLA amendments and the omnibus 1990 Oil Pollution Act, Congress placed the environmental, prevention, clean-up and liability purposes squarely in the foreground of the maritime pollution picture. General maritime law’s marine pollution tort has been moved to the periphery 19 while state police power finds

16 Id.
18 Id.
19 Marginalizing general maritime law in actions brought under OPA and delegating wide latitude to the states to do the same (as long as state initiatives enjoy the shelter of OPA Sec. 2718) would have raised serious constitutional issues during the era dominated by Southern Pacific Co. v. Jensen, 244 U.S. 205 (1918) and Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1924). As Professor David Robertson observed in 1970, however, “it is probably true that the commerce clause, as it has been construed, is broad enough to support any Congressional action supportable under the admiralty grant, including any pre-emption of possible state power.” Admiralty and Federalism 145 (1970). An illustration of the Supreme Court’s current view of the question appears in its acknowledgement in Rodrigue v. Aetna Cas. & Sur. Co., 395 US. 352, 361(1969) that “[e]ven if admiralty law would have applied to the [OCSLA-situs platform] deaths occurring in these cases under traditional principles, the legislative history shows that Congress did not intend that result.” OCSLA, as Judge Rubin has observed, “depends on national sovereignty and the commerce clause; the cause of action it creates is one arising out of a general federal statute, and federal court jurisdiction depends on the existence of a federal question, .... not admiralty.” Smith v. Pan Air Corp., 684 F.2d 1102, 1107 n. 12 (5th Cir.1982). OPA, the Senate Report declares, “[create[s] a single Federal law providing clean-up authority, penalties, and liability for oil pollution. H.R. Conf. Rep.
itself closer to the center. OPA Sections 2718 and 2751, which define OPA’s partial non-displacement of admiralty/general maritime and state law, respectively, confirm that one or the other may prevail as choice of law candidates in BP litigation only to the extent that BP courts conclude that Congress has chosen not to supersede or pre-empt them in its pursuit of FWPCA/OCSLA/OPA environmental/pollution control values.

It is difficult to overstate the significance of this shift for the choice of law issues with which this paper deals. State rather than federal law most often has been the candidate opposing general maritime law in the evolution of choice of law jurisprudence. In most instances, the latter prevails once a court determines that the controversy falls within admiralty jurisdiction. The choice of law issue, that is, is determined by the jurisdictional issue in accordance with the axiom that “with admiralty jurisdiction comes the application of substantive admiralty law; absent a relevant [federal] statute, the general maritime law, as developed by the judiciary, applies.”

Setting the table for BP oil spill litigation with the federal statutes as the host and general maritime law as the guest diminishes admiralty’s influence. Even if admiralty jurisdiction is found alongside federal question or other sources of jurisdiction associated with OCSLA/OPA, the former does not preordain its own selection in choice of law contests. Rather, general maritime law will prevail only if it is not preempted by the federal statutes. If it is not, it should prevail against competitors only when it is better suited than they to align with the anti-pollution federal statutory goals.

This paper’s theme is that the shift assigning primacy to the federal statutory regime renders the latter neither a general maritime “duck” nor a state police power “fish,” but something fundamentally different from either. Its correlative theme is that the BP scenario’s uniquely novel and perplexing dimensions will leave future BP courts little choice but to come to terms with this shift in ways, I believe, that they have not to date.

Doing so will challenge familiar modes of reasoning. It may, for example, lead courts to appreciate that calling something a “vessel” or

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describing something else as a “traditional maritime activity” may commence, rather than conclude an inquiry. Two further questions must be asked. Does the context in which these labels arose differ from that describing the nation’s most punishing maritime incident? Does ascribing an invariable meaning to the label comport with the environmental and pollution prevention goals of the federal statutory regime?

My premise that BP oil spill judges are likely to attend more favorably to choice of law candidates outfitted to accommodate these goals derives from the Supreme Court’s objection to “fortuitous,21 “perverse”22 or “absurd”23 results that may result from pinning the admiralty tail on disputes for which admiralty can claim no expertise.

The Supreme Court undertook to discourage this practice in Executive Jet Aviation Company v. City of Cleveland24 by requiring a “substantial relationship” connecting the matter in question “to traditional maritime activity.”25 “In determining whether there is admiralty jurisdiction over a particular tort or class of torts,” the Court stated, “reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than a purely mechanical application of the locality test.”26

Consonance requires that admiralty law, which Justice Holmes correctly described as a “very limited body of customs and ordinances of the sea,”27 possesses the accumulated expertise with and experience in the matter in question to warrant passing judgment on the matter. Hence, the Court’s observation that “[t]hrough long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage and claims for salvage.”28

Applying this criterion to the airline accident in question, it reasoned that admiralty law was not the appropriate choice because admiralty’s “rules and concepts” are “wholly alien to air commerce.”29 It assigned to “the familiar concepts of [state] tort law” a situation it

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22 Id.
23 Id.
24 Id. at 261.
25 Id. at 267.
26 Id. at 261.
27 Southern Pacific Co. v. Jensen, 244 U.S. 205, 220 (1917) (Holmes, J. dissenting).
28 Id at 270.
29 Id at 506.
deemed "only fortuitously and incidentally connected to navigable waters and which bears no relationship to traditional maritime activities." Whether or not the drilling of oil on the OCS seabed bears a sufficient relationship to admiralty law is one of a variety of choice of law questions addressed presently in this paper.

State rules may prove more robust than general maritime law because many have been intentionally adopted to serve these objectives, while others engage state causes of action that are readily adapted to this purpose. They will also benefit from the presumption of non-preemption by federal statutes, which surfaces with distinctive force, Askew teaches, in the marine pollution sphere. But state rules may encounter resistance when the blowouts or spills occur on the OCS beyond state territorial waters.

General maritime law's standing is more problematic. Its judge-made principles do not enjoy a presumption against displacement by a federal statute. Despite idealized assertions of admiralty's capacity to resolve complex social or economic issues, the reality, as Justice Holmes counseled, is that general maritime law is not a "corpus juris, but "a very limited body of customs and ordinances of the sea." Although committed to uniformity as the lodestar for resisting incursions on admiralty law, Robert Pelz readily agrees to an exception in the marine pollution sphere because "traditional maritime law simply does not address [environmental or pollution disasters] either because [these] issues did not exist in the past or were not considered important."

Nor is admiralty law's traditional opposition to liability-expanding initiatives helpful, a reality that accounts for Congress's express displacement of some of these rules, and requirement that the balance pass through Section 2751's partial non-supersession screen.

It has fallen to Congress to formulate the federal pollution liability and compensation regime and to deputize numerous federal agencies to aid in its implementation. As Pelz recognizes, general maritime law simply lacks the capacity or expertise, experience, and engagement to

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30 Id. at 273.
33 Southern Pacific Co. v. Jensen, 244 U.S. 205, 235 (1918) (Holmes, J., dissenting).
35 Lawrence Kiern has detailed the fierce opposition of the shipping and insurance industries, two of admiralty law's principal stakeholders, to OPA's financial responsibility provisions as set forth both in the statute and Coast Guard regulations. See L. Kiern, n.1 supra, at pp. 558-570.
36 Examples are OPA's displacement of the Limitations Act of March 3, 1851, see OPA Sec. 2718(a) (1), and its likely displacement of the Robins Drydock rule (a traditional component of general maritime law), OPA Sec. 2702(b) (2) (E).
address purposes for which Congress designed the regime. The magnitude of the recent Gulf of Mexico debacle is more than likely to drive this point home for the BP courts.

Perhaps general maritime law's expertise deficit would not be troublesome if were likely to be overcome by judges making this law from decision to decision. A similar effort, discussed presently in the Illinois/Milwaukee dispute\textsuperscript{37} that engaged the federal courts in formulating interstate water pollution standards, advises otherwise. Having initially declared that interstate water pollution constitutes a nuisance that must be addressed by federal common law, the Supreme Court expressed more than a little relief in ruling that the cause of action was supplanted by the FWPCA's subsequent amendment to include detailed standards administered by the Environmental Protection Agency. "Congress," the Court stated,

has not left the formulation of appropriate federal standards to the courts through the application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.\textsuperscript{38} The disabilities that judge-made maritime law shares with judge-made federal common law are largely identical, of course.\textsuperscript{39}

This paper offers a preliminary inquiry into whether and how Congress's choice to govern OCS oil spills and well blowouts as environmental events may impact conventional understandings of the role of admiralty and general maritime law in the maritime pollution matters. A single paper written at the threshold of what will likely be a decade or more of litigation, however, cannot pretend to address the breadth and complexity of the subject.

Limiting choices are necessary. Mine is to focus discussion on selected choice of law questions certain to arise in OPA-based actions brought by private claimant for economic damages against OPA-designated "responsible parties"\textsuperscript{40} and their "guarantors."\textsuperscript{41} This choice in no way exhausts the range of BP-related lawsuits under other state or

\textsuperscript{39} The Second Circuit takes the position that the federal common law of maritime pollution "rest(s) upon maritime law." See United States v. Oswego Barge Corp., 664 F.2d 327, 334 (2d Cir. 1981).
\textsuperscript{40} OPA responsible parties of greatest concern in this paper are owner/operators or demise charterers of vessels, and lessees of areas leased by the Department of Interior, see OPA Secs. 2701(32) and 2702(a).
\textsuperscript{41} Included are entities providing evidence of financial responsibility for a responsible party. See OPA Secs. 2701(13) and 2716.
federal laws or engages other than OPA-named defendants except to the extent that discussion of the paper’s core issues bear on these actions. If endorsed by BP courts, for example, the position that OPA constitutes the sole federal action that may be pursued for the Section 2702(b) (2) categories of economic damages would obviously disqualify actions for these same damages under general maritime law notwithstanding OPA Section 2751.

II. The BP Oil Spill

A. BP and Exxon Valdez Compared

Were Escher a mean-spirited law professor, he would have delighted in designing a law school hypothetical as enigmatic as the BP oil spill scenario. Like this scenario, the most challenging hypotheticals are those that sit at the confluence of myriad conflicting principles, with each operative fact a siren leading students — or BP spill litigators — down paths from which they may never return. No matter how seductive or seemingly apt, none of the principles fit neatly over this table. Recourse to others amplifies the confusion because they often add to the maze’s confusion.

Welcome to the BP portal.

Set forth below are the scenario’s operative facts and, where appropriate, OCSLA and OPA statutory language that BP courts may conclude requires interpretation as a basis for making required choice of law decisions. The paper’s following section returns to both as a basis for speculating about directions they may suggest if BP courts affirm the primacy of Congress’s environmental and pollution goals. The BP scenario is contrasted with its Exxon Valdez counterpart to dramatize the fundamental differences between the two, and to offer a framework for thinking about the former as the factually and legally unprecedented event that it truly is.

The Exxon Valdez was a “vessel.” It was also the sole instrumentality in the Prince William Sound oil spill.

The BP scenario features two instrumentalities, BP’s blown-out well and Transocean’s Deepwater Horizon semi-submersible drilling rig, which in OPA’s parlance is a mobile offshore drilling unit (MODU). The well, of course, is not a vessel.

The MODU may or may not be a vessel for admiralty jurisdiction purposes depending upon judicial interpretation of one or some combination of the following OPA and OCSLA terms in light of the governing purposes of Congress’s pollution prevention and liability scheme. OPA defines a “vessel” as “every description of watercraft or

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43 2701(18).
other artificial contrivance used, or capable of being used, as a means of transportation on water." OPA defines a MODU as "a vessel ... capable of use as an offshore facility." However, an "offshore facility" is "any facility of any kind located in, on or under the navigable waters of the United States ... other than a vessel or a public vessel." An "Outer Continental Shelf facility" is an "offshore facility... located on the Outer Continental Shelf [that] is or was used for one or more of the following purposes: exploring for, drilling for, producing ... or ... transporting oil produced from the Outer Continental Shelf," terms that define the principal activity subject to OCSLA's governance. Finally, in fixing liability limits, OPA Sections 2704(b) (1) and (2) inform that a MODU is both capable of "being used as an offshore facility," and, in fact "is deemed to be an offshore facility," respectively. The section allocates liability under this section to the MODU for above-water spills, and to the OCS lessee for oil emanating from below the water.

OPCSLA, it will be recalled, expressly "extends" the "Constitution and laws ... of the United States" to the "subsoil and seabed of the outer Continental Shelf and to ... all installations and other devices ... temporarily attached to the seabed...", thereby including semi-submersible drilling rigs in the mix. The purpose OCSLA selects for these fixtures is "exploring for, developing, or producing [OCS] resources." The Exxon Valdez was transporting oil when it ran aground. Transportation of cargo in maritime commerce is the archetypal "traditional maritime activity," which, along with occurrence of an activity on a maritime situs is one of the two prerequisites for general maritime tort jurisdiction.

Transocean and BP were drilling an exploratory well on the OCS seabed for eventual development and production of oil and gas when the blowout and discharge occurred.

The Exxon Valdez ran aground and discharged its oil in state territorial waters. Hence, both the discharge's source and its effects were located within the same state. OCSLA, which addresses discharges at OCS situses, played no role in this litigation. Nor was it necessary for the

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44 OPA Sec.2701(37).
45 OPA Sec.2701(22) (emphasis added).
46 OPA Sec.2701(25) (emphasis added).
48 OCSLA Sec.1333(a) (1).
49 Id.
Exxon Valdez courts to address the potential complications posed by interfederal/state marine pollution, that is, a discharge occurring on the OCS, an exclusive federal enclave, but wreaking its havoc in high sea and state waters superadjacent to submerged lands as well as on coastal shorelands and within the interior of scores of states.

The location of BP’s well blow-out on the OCS, brings OCSLA directly into play. As we have seen, Section 1333(a) (1) extends the “Constitution and laws... of the United States” to the OCS seabed and to “temporarily attached” installations. OPA as well as OCSLA’s various pollution prevention and allied environmental provisions, of course, are “laws ... of the United States.” OCSLA Section 1332(a) (2) (A) also merits notice. When formulating OCSLA in 1953, Congress foresaw that there would be instances that would lack an extant federal law covering possible OCS controversies, particularly those relating to the welfare of platform workers. Accordingly, it authorized courts to fill such gaps when they arose by federalizing applicable adjacent state law that was not itself “inconsistent ...with other federal law.”

This qualification has been interpreted to bar state law principally in choice of law situations pitting state law against general maritime law. The latter usually wins if the court finds that it “applies of its own force.” But it is important to observe that absent a void in federal law, state law will not even become a candidate. If it does, moreover, it may be disqualified because it is “inconsistent” with other OCSLA requirements or with “other federal law,” a phrase that surely includes OPA.

III. Selected Choice of Law Issues

The range and complexity of the choice of law issues awaiting resolution in BP litigation far exceed this paper’s modest goal which is to suggest ways in which viewing the BP oil spill primarily as an environmental event might influence the future resolution of BP choice of law issues. Hence, the necessity of restricting the following discussion to selected issues only.

A. State Law and OPA/OCSLA

United States v. Locke: The Starting Point

How extensively will the partial preclusion of state law framed by OPA Section 2718 stunt the application of state law as both a measure of and the source of procedures for addressing damages associated with oil pollution discharges? As with virtually every question asked so far, the answer varies with the context chosen for the response.

American Waterways Operators v. Askew\textsuperscript{52} and United States vs. Locke\textsuperscript{53} suggest that the states will do quite well, at least in situations in which the oil discharge is "within" their territorial waters. An earlier reference to Askew, disclosed the extensive latitude the Supreme Court ceded Florida in the use of its police power to regulate oil pollution comprehensively within state waters. More recently, the Court in Locke defined the borders of that latitude in a result that speaks well for state power despite Locke's finding of preemption by federal statute.

The Court identified three levels to fix alternative borders: wholesale regulation of maritime navigation; regulation beyond the scope of OPA's liability and compensation title to include other OPA titles addressing other matters; and regulation remaining within the framework of the former title. The Court ruled that the federal Ports and Waterway Safety Act of 1972\textsuperscript{54} preempted Washington's statute because it exceeded the scope of OPA Title I by addressing matters of vessel design and operations.

It reasoned that the state failed to respect OPA Section 2178's textual focus on oil pollution "discharges;"\textsuperscript{55} ignored the section's location in Title I, which deals exclusively pollution liability and compensation;\textsuperscript{56} upset a Congressionally determined balance of shared national and state power in the navigation control sphere driven in part by federal foreign relations reciprocity concerns;\textsuperscript{57} and overlooked the OPA bill conferees' declaration that Section 2718 was not intended to overrule an earlier court opinion that struck down a similarly ambitious Washington state initiative.\textsuperscript{58}

The very good news for the states, however, is the Court's observation that "[p]lacement of the savings clauses in Title I of OPA suggests that Congress intended to preserve state laws of a scope similar to matters contained in Title I of OPA,"\textsuperscript{59} a concession of major moment given the Title's breadth. Likewise beneficial to the states is the Court's following observation:

Limiting the saving clauses as we have determined respects the established federal-state balance in matters of maritime commerce between the subjects as to which the States retain concurrent powers

\textsuperscript{52} 411 U.S. 325 (1972).
\textsuperscript{53} 529 U.S. 89 (2000)
\textsuperscript{55} See OPA Sec, 2718 (a) (1) and (c) (2).
\textsuperscript{56} See OPA Sec. 2701-2720.
\textsuperscript{57} United States v. Locke, 529 U.S. 89, 109 (2000).
\textsuperscript{58} Id. at 107. The decision referred to is Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).
\textsuperscript{59} United States v. Locke, 529 U.S. 89, 105 (2000).
and those over which the federal authority displaces state control. We have upheld state laws imposing liability for pollution caused by oil spills, [citing Askew]. Our view of OPA’s savings clauses preserves this important role for the States, which is unchallenged here.60

With OPA on the books, moreover, states whose initiatives comport with OPA but conflict with general maritime law will likely avoid the preemption by the latter that they would have experienced but for OPA. In re the Glacier Bay61 is instructive. It ruled that OPA’s amendment of the Trans-Alaska Pipeline Act62 by the addition of its provision allowing states loss of revenue damages63 displaced the Robins Drydock rule of general maritime law, and revitalized an Alaska statute that, like OPA, negated that rule. This outcome too reflects a major step forward for the states in freeing them from Jensen-inspired constraints on their effort to protect their environments and their citizens’ welfare.

B. State Law as Surrogate Federal Law under OCSLA Section 1333(a) (2) (A)

Two areas in which the federal statutes may cut the other way and bar the use of state law pertain, first, to state law’s use as surrogate federal law under OCSLA Sec. 1333(a) (2) (A) and, second, to state law’s use qua state law in scenarios featuring BP-type interfederal/state oil pollution events.

The analysis supporting the first outcome is straightforward. OCSLA Section 1333a) (1) extends the “laws ... of the United States to the subsoil and seabed of the outer Continental Shelf and... all installations and other devices permanently or temporarily attached to the seabed” erected for exploitation of the Shelf’s oil and gas reserves. OPA, of course, is a “law of the United States” which is extended to BP’s OCS oil well and the Deepwater Horizon rig, the “installations and other devices” referenced in the statute.

In actions commenced under OPA, therefore, there is no need to become ensnared in Section 1333(a) (2) (A)’s many complications. The section’s purpose is the gap-filling made necessary by the absence of otherwise applicable federal law. Thanks to OPA, however, there is no gap for actions instituted under OPA. Congress enacted OPA expressly to govern the pollution liability and compensation dimensions of OCS discharges under a scheme that itself is largely derivative of OCSLA’s own former Title III.

60 Id. at 106.
63 OPA Sec. 2702(b) (2) (D).
Nor is general maritime law likely to prevail against OPA under these OCSLA provisions. Through OPA Sections 2702, the basic liability provision, and 2751, the partial preclusion of admiralty law provision, Congress has displaced admiralty and general maritime law as a rival to OPA on matters to which OPA speaks. Congress's intention to achieve this outcome becomes evident simply by pairing the introductory phrase of Section 2702(a) — "[n]otwithstanding any other provision or rule of law and subject to the provisions of this Act" with that of Section 2751(e) — "[e]xcept as otherwise provided in this Act."

It would be anomalous, moreover, to favor maritime law over OPA in light of the Court's endorsement in Rodrigue of congressional testimony that application of maritime law would be unwise because "[m]aritime law in the strict sense has never had to deal with the resources in the ground beneath the sea, and its whole tenor is ill adapted for that purpose."64 Admittedly, maritime law's inadequacies in addressing worker social welfare and labor concerns worried the draftsmen of the 1953 Act.65 With the elevation of environmental and pollution goals as key OCSLA concerns in 1978, however, maritime law's suitability as a replacement for OPA as a basis for allocating BP spill liability has become more remote still.

C. State Law's Role in an Interfederal-State Maritime Pollution Scenario

Judicial response to the BP spill's interfederal/state character is difficult to predict because courts will be refereeing a battle between contending forces that would otherwise enjoy their support. The first, as we have seen, is the deference our federal system accords states to protect the natural resources, property and welfare of states and their residents. The second is protection of the federal government's position in the array of imperative revenue, proprietary, energy and foreign relations interests that persuaded Congress to enshrine national dominion, sovereignty and exclusive jurisdiction over the outer continental shelf.

The fierce competition between the national and state government for control of the so-called "submerged lands" dates at least back to the Tidelands controversies of the last mid-century. A kind of uneasy equilibrium now allocates concurrent regulatory powers but exclusive dominion to the states over submerged lands below their territorial seas, while reserving the federal government's exclusive legislative and proprietary dominance seaward of this limit. Onshore/territorial sea oil and gas exploration will continue to diminish, no doubt, as outer

65 Id. at 365.
continental shelf exploration expands. The environmental and pollution prevention risks of OCS drilling will grow as the search for oil moves even farther from shore and deeper below the sea.

"The federal government's authority over the shelf is ... plenary," the President's Commission reminds us, "based on its power as both the owner of the resources and its regulatory capacity as sovereign to protect the public health, safety and welfare."67

The Supreme Court has already established that regulation of interstate pollution is a federal law matter, whether it is managed by federal judges68 or by Congress.69 Stepping into a dispute in which Illinois sought to apply Illinois standards to Lake Michigan marine pollution emanating from Milwaukee, Wisconsin, the Court ruled that an affected state may not invoke its law to regulate maritime pollution originating in another state.70 Its rationale, as stated by the Seventh Circuit on remand of the second of two separate proceedings, was that the interstate scenario poses a "problem of uniquely federal dimensions requiring the application of uniform federal standards both to guard states against encroachment by out-of-state polluters and equitably to apportion the use of interstate waters among competing states."71

Shortly after the first proceeding, Congress amended the FWPCA bringing to the water pollution control field levels of detail and federal agency control comparable to those featured in the OCSLA/OPA regime. As mentioned in the paper's introduction, the Court ruled post haste in City of Milwaukee v. State of Illinois72 that the amended FWPCA superseded the judicially declared federal common law of nuisance. OPA's supersession of those aspects of general maritime law to which OPA speaks can likewise be anticipated.73

OCSLA declares that the states' right to "preserve and protect their marine, human, and coastal environments through such means as regulation of land, air and water uses, [and] of safety ... should be considered and recognized."74 The FWPCA, moreover, presumptively shields state police power initiatives from the preemptive reach of federal law by inclusion of non-preemption provisions that preserve the right of

66 President's Report 294.
67 Id. at viii.
73 In the Second Circuit's view, in fact, the federal common law of nuisance "rests on maritime law." United States v. Oswego Barge Corp., 664 F.2d 327, 334 (2d Cir. 1981).
74 OCSLA Sec. 1332(3).
states “to adopt or enforce any standard ... respecting discharges of pollutants,” and that expressly disclaim any intent to impair “any right or jurisdiction of the states with respect to the waters ... of such states.” Despite this seemingly ample language, the Court construed the latter provisions to refer solely to pollution discharges that occur wholly within the affected state. As the court viewed the matter, it seems implausible that Congress meant to preserve or confer any right of the state claiming injury (State II) or its citizens to seek enforcement of limitations on discharges in State I by applying the statutes or common law of State II. Such a complex scheme of interstate regulation would undermine the uniformity and state cooperation envisioned by the Act. For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states. Dischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water. Any permit issued under the Act would be rendered meaningless. In our opinion Congress could not have intended such a result.

Barring the choice of state law by narrowly construing OPA’s Section 2718 might appear even more compelling to a BP court. OPA Section 2718(a) (1) (A) also limits its preemption shield to measures addressing a “discharge of oil ... within such state.” Unlike a mere interstate conflict, moreover, the BP discharge issued from the OCS seabed, whose status as an exclusive federal enclave elevates and expands the basis for federal law primacy in light of the proprietary, national defense and energy, interstate and foreign commerce, and national environmental interests identified throughout this paper. Although a decision in BP litigation to bar state law would square with Supreme Court precedents, the Court’s willingness in the later Illinois/Milwaukee case to conduct the statutory non-preemption inquiry requested by Illinois would seem to imply that barring state law may be less a matter of constitutional necessity than of judicial deference to Congressional preference. If this paper’s forecast is correct that OPA/OCSLA portends broad preemption of general maritime damages, moreover, private OPA damage claimants might find themselves

75 33 U.S.C. Section 1370.
76 33 U.S.C. Section 1372.
77 State of Illinois v. City of Milwaukee, 731 F.2d 403, 414 (7th Cir. 1984)
78 Id. at 414
79 TAN infra
constrained to pursue the damages inventoried in OPA Section 2702(b) (2) under OPA alone.

With two significant exceptions, this alternative may not prove disadvantageous to private claimants. They may do as well or better under OPA Section 2702’s substantive damages provision than under their own state systems given OPA’s strict liability standards, generous damage caps, the caps’ cession in the event of a responsible party’s gross negligence or reckless conduct, and OPA Section 2702(2) (b) (2) (E)’s likely rejection of Robins Drydock. OPA addresses only economic claims occasioned by oil discharges, moreover, leaving personal injury and death claims unaffected.

Less favorable, perhaps, is the rigidity of OPA’s claims procedures. Private damage claims sought in an OPA-based action, it has been ruled apparently can be brought only against responsible parties rather than against the latter and such potential partial-fault third parties as Cameron, fabricator of the discharge’s blow-out preventer, or Halliburton, the cementing subcontractor. Not only is plaintiff access to the latter at risk, but recovery against responsible parties may be delayed as well.

Also troublesome to private claimants in states in which punitive damages are allowed may be the loss of this advantage if state law is barred. OPA Section 2718’s non-preemption of state actions “imposing any additional liability or requirements” offers a credible, although hardly indisputable basis for a sympathetic court to conclude that the section preserves state law punitive damages claims against BP’s responsible parties. This pathway will be lost, of course, if the courts bar state law’s use in an interfederal/state claim. Since OPA itself is silent regarding punitive damages, these state claimants (along with all other claimants) will have to look to general maritime law for such relief hoping, of course, that OPA’s silence will not be construed as barring these damages.

80 OPA Sec. 2702a.
81 OPA Sec. 2704(i.)-(d).
82 OPA Sec 2704(c ) (1).
85 OPA’s silence on punitive damages has been interpreted by one court as negating their availability under general maritime law. See South Port Marine Facility LLC v. Gulf Oil Limited Partnership, 234 F.3rd 58 (1st Cir. 2000). Whether or not the Supreme Court’s holding in Exxon Shipping Co. v. Baker, 554 US. 471 (2008) that the silence of the Clean Water Act (33 U.S.C Sec. 1321) did not preclude punitive damages under general maritime law will impact subsequent litigation under OPA regarding punitive damages is a topic of more than casual interest to the bar.

- 229 -
D. OPA/OCSLA and General Maritime Law

Shifting the choice of law inquiry to general maritime law, two further inquiries present themselves, only the first of which receives the attention both would merit in a more exhaustive study than can be undertaken here. Is the BP oil spill an admiralty tort at all? If so, to what extent are general maritime law principles available for or excluded from BP spill contests by OPA Section 2751, under which admiralty and general maritime law remain unaffected “except as otherwise provided in th[e] Act.” The second question has already been addressed selectively in the preceding paragraphs. It will receive brief comment in this paper’s conclusion. A comprehensive treatment, unfortunately, calls for a second paper or, more likely, an entire volume.

The contest posed by the first question may prove a good deal more challenging for admiralty jurisdiction than many may think. Credible attacks can be launched on admiralty claims premised on labeling OCS oil and gas drilling a “traditional maritime activity or the Deepwater Horizon a “vessel.” Executive Jet’s requirements of a maritime situs and a substantial nexus between the activity giving rise to the alleged tort and a “traditional maritime activity,” therefore, must be our starting point.

1. “Substantial Relation to a Traditional Maritime Activity”

Executive Jet’s requirement of a substantial relation between the wrong and a traditional maritime activity has been modified by Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock 86 to include an additional showing that the incident giving rise to the tort is of a kind likely to have a potentially disruptive impact on maritime commerce. 87 There is little doubt that the BP oil spill and response not only had the potential to disrupt maritime commerce but actually did so.

Less certain is whether the general character of the activity giving rise to the wrong — the drilling for oil and gas on the OCS seabed — bears a substantial relationship to traditional maritime commerce. Other than 1969 Santa Barbara blowout litigation, which preceded the passage of the OCSLA amendments and OPA, my research has not located a single reported opinion addressing the issue of liability for an OCS well blowout under these statutes. It is not without importance, nonetheless that the lead case in that litigation stated outright that “drilling for oil from fixed platforms located over the outer Continental Shelf is not in itself a traditional maritime activity....” 88

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87 Id. at 534.
88 Union Oil Co. v. Oppen, 501 F.2d 558, 561 (1974). But in a holding that runs flatly counter to the four Supreme Court decisions analyzed in this subsection, which focus on the activity of the tortfeasor, the court stated “that the ‘activity’ whose relationship to traditional maritime activity was to be examined was that of the injured party, not that of the tortfeasor.” Id. The injured parties in Union Oil were commercial fishermen, and the
The OCSLA cases, including the two Supreme Court cases discussed below, do not concern blowouts, but arise principally in one of two contexts. The first comprehends personal injury tort incidents on or near OCSLA installations; the second, contracts relating to employee matters (usually the allocation of liability for employee injuries or deaths among contractors or employers) or to the provision of services or facilities for OCS energy production. These cases are heard principally in the Fifth Circuit in consequence of the concentration of OCS oil and gas activities off the Louisiana and Texas coasts.

Potentially at least, the Fifth Circuit’s OCSLA jurisprudence could have provided the Supreme Court useful instruction in addressing this subsection’s leading question. The Circuit has often been called upon to address the linkage of OCS oil drilling operations to traditional maritime activities — albeit again not in the BP blowout context. Unfortunately, its jurisprudence is in disarray. Describing the area as “infamously chaotic,” David Robertson commends Fifth Circuit judges for the candor of their self-criticism. One judge vented his frustration with the observation that

[i]n each new case a panel of [the Fifth Circuit] must comb through a bewildering array of cases that rely upon inconsistent reasoning in the hope of finding an identical factual situation. Absent en banc reconsideration, cases are thus decided on what seems to be a random actual basis.89

Another complained that

[a]s is typical, the final result turns on a minute parsing of the facts. Whether this is the soundest jurisprudential approach may be doubted, inasmuch as it creates uncertainty, spawns litigation, and hinders the rational calculation of costs and risks by companies participating in [the OCS oil and gas] industry. Nevertheless, we are
court ruled that “the fishing industry is clearly a part of traditional maritime activity.” Id. In consequence, the court held that OCSLA Sec. 1333(a) (2) (A) allowed application of general maritime law, rather than requiring application of adjacent state law as surrogate federal law. Id. at 562. The court did not feel that a choice between general maritime law and state (California) law qua state law was necessary because it regarded the doctrines of both as essentially identical. Id. at 562-63.

bound by the approach this court has followed for more than two
decades.90

We can anticipate, I believe, both that the traditional maritime
relationship issue as posed in the distinctive BP spill setting will
eventually find its way to the Supreme Court, and that the Court will
utilize its own precedents, principally Rodrigue v. Aetna Cas. & Sur.
Company91 and Herb's Welding, Inc. v. Gray,92 as aids to its resolution.

Rodrigue held that OCSLA Section 1333a(1) and (a) (2) (A)
required the choice of Louisiana law as surrogate federal law over
admiralty’s Death on the High Seas Act in selecting remedies arising out
of the deaths of two platform employees working on OCS fixed
platforms. Its immediate holding and rationale seem to disqualify it as a
cogent precedent for OCS seabed blowout disputes because the
OCSLA/Louisiana law outcome is so clearly focused on the Court’s
equation of the fixed platform with an “artificial island” and with a
rationale linking this characterization to the welfare of the workers and
their families within the nearby adjacent state. “[T]he special relationship
between the men working on the artificial islands and the adjacent shore
to which they commute to visit their families was ... recognized by
dropping the treatment of these structures as ‘vessels’ and instead ... ‘as
if (they) were (in) an area of exclusive Federal jurisdiction located within
a State.”93 As addressed within OPA’s framework, the BP spill is about a
seabed well blowout and about the allocation of liability in consequence
of its ensuing economic damages to many thousands of private and
governmental claimants.

Yet the Court’s treatment of OCSLA’s legislative history suggests
an implicit acknowledgement that Congress intended to go beyond
accidents atop fixed platforms and employee welfare. Hence, the Court’s
observation that OCSLA’s Conference Committee “was acutely aware of
the inaptness of admiralty law. The bill applies the same law to the
seabed and subsoil as well as to the artificial islands, and admiralty law
was obviously unsuited to this task.”94

The Court also quoted testimony to the committee by an admiralty
expert who stated that the application of maritime law would be unwise
because “[m]aritime law in the strict sense has never had to deal with the
resources in the ground beneath the sea, and its whole tenor is ill adapted
for that purpose.”95 The Court then added that “[s]ince the Act treats

90 Hoda v. Rowan Companies, Inc., 419 F.3rd 379, 380 (5th Cir. 2005)(Jones J.)
94 Id. at 364-65 (emphasis added).
95 Id. at 365.
The Court stuns, moreover with its unqualified statement that it “has specifically held that drilling platforms are not within admiralty jurisdiction” citing its per curiam affirmation, without opinion, of a federal district court opinion, Phoenix Construction Co. v. The Steamer Poughkeepsie. The district court had held that the collision of a vessel with a temporary platform erected around piles placed in the Hudson River to support construction of an aqueduct did not engage admiralty jurisdiction. The Court reasoned that although the pilings and temporary platform above were in a river and river bottom, the project itself — supplying water to a metropolitan area — was “not even suggestive of maritime affairs.”

With Herb's Welding, Inc., Rodrigue suddenly looms much larger than it appeared to on its decision day. At issue was whether or not an injured welder who worked on pipelines and drilling platforms was engaged in “maritime employment” under Sec. 902(3) of the Longshoreman and Harbor Workers Compensation Act (LHWCA). Holding that the Fifth Circuit's position that “offshore drilling is maritime commerce” is “untenable,” the Court pressed Rodrigue into service on a variety of fronts. First, it employed Rodrigue, an OCSLA choice of law case, as a governing precedent in this LHWCA dispute. Second, it recalled Rodrigue's use of the earlier Phoenix Construction district and Supreme Court decisions and of Rodrigue itself to reassert that drilling platforms are not within admiralty jurisdiction and are “not even suggestive of maritime affairs.” Third, it posited that Congress, when amending the LHWCA in 1972, presumably did so with awareness of the 1969 Rodrigue decision and hence, would not have used the phrase “maritime employment” to reach drilling rigs generally since they are a part of maritime commerce. Fourth, it adverted to its analysis in Rodrigue of OCSLA's legislative history to conclude that this history "at

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96 Id.
98 Phoenix Construction Co. v. The Steamer Poughkeepsie, 212 U.S. 558 (1908)
99 162 F. 494 (1908)
101 Id. at 421.
102 Id. passim.
103 Id. at 422.
104 Id. at 424.
the very least forecloses the Court of Appeals holding that offshore drilling is a marine activity....”

The plaintiff, the Court stated “built and maintained pipelines and the platforms themselves. There is nothing inherently maritime about those tasks. They are also performed on land, and their nature is not significantly altered by the marine environment, particularly since exploration and development of the Continental Shelf are not themselves maritime commerce.” In support of these assertions, the Court quoted the following testimony of the general counsel to the International Association of Drilling Contractors:

Irrespective of design, bottom resting, semi-submersible, or full floating, these structures [drilling platforms] perform only as a base from which the drilling industry conducts its operations. The operations, once the structure is in place, are no different from that which takes place on dry land. All of the equipment and methods utilized in the drilling operations are identical to our land based operations. The exposure to employee injuries are the same. Accident frequency rates and severity of injury are no greater, in fact less, because of crew selection and confinement to an area permits concentrated training and safety programs.” Senate Subcommittee Hearings at 410-411.

Following Executive Jet, the Court has reaffirmed as a basis for an admiralty tort that the wrong must bear a substantial relation to a traditional maritime activity in Foremost Insurance Co. v.Richardson, Sisson v. Ruby, Grubart, and, most recently, Herb’s Welding. If the Court were to apply this requirement in the BP litigation, the claim of admiralty jurisdiction for the BP oil spill -the epitome of an oil and gas drilling operation — may prove difficult to sustain.

2. Situs

OPA Section 2701(37) defines the Deepwater Horizon as a “vessel.” But other pertinent OPA and OCSLA provisions call into question whether this naked designation is sufficient to establish admiralty jurisdiction. Throughout this paper, we have seen the word “vessel” expand or contract with the context in which it is used. OPA Section 2704(b) (1) and (2) characterize the rig as an “offshore facility” for purposes both of limiting and of allocating OPA liability as between the Deepwater Horizon’s owner/operator and the BP well lessee. In its

105 Id.
106 Id. at 426.
107 Id. at 426, n. 11.
109 497 U.S. 358 (1990)
definition of a MODU, moreover, Section 2701(18) also cloaks the rig in both “vessel” and “offshore facility” clothing. Yet Section 2701(22) tells us that offshore facilities exclude “vessel[s].” OCSLA Section 1333a(1) eliminates drilling rigs as situses conferring admiralty jurisdiction in OCSLA-based actions by extending its provisions to “all installations and other devices … temporarily attached to the seabed,” an accurate description of the Deepwater Horizon’s status. OCSLA’s Title III, now repealed as a basis of transitioning to OPA, limited the term “vessel” to ships transporting oil to and from offshore facilities while denoting as non-vessels all other ships, mobile drilling platforms and the like. Finally and, I believe, not incidentally, the President’s Commission has estimated that the Deepwater Horizon rig accounted for only .0095 percent of the total amount of the estimated spill by the total BP spill.

What we can conclude from these facts and varying designations is that Congress not only may choose, but indeed has chosen to regard the same entity, a contrivance on the navigable waters of the United States, as creating admiralty jurisdiction for some purposes, but not for others. The very plasticity and indeterminacy of the term “vessel” might incline BP courts to look to the pollution prevention and liability purposes of the legislative regime in which it appears as the context for fixing its meaning. Doing so may and perhaps should deprive the term of the talismanic force it enjoys in other contexts.

The Deepwater Horizon contributed a mere .0095 percent of the BP spill’s total discharge. Environmentally, it is a Frankenstein monster whose size, technology and capacity to engender the nation’s worst pollution disaster could not possibly have been imagined when the “contrivance” definition was conceived in 1871. In puzzling over the significance they should give to the term, BP courts will perhaps take into account Judge Minor Wisdom’s counsel that “[a]ttempts to fix unvarying meanings having a firm legal significance to such terms as ‘seaman’, ‘vessel’, ‘member of a crew’ must come to grief on the facts.” Nor is it insignificant that Title III of the 1978 OCSLA amendments treated as non-vessels every category of ship other than those transporting oil to and from OCS installations.

A less porous basis for admiralty jurisdiction is the BP oil’s movement from its OCS subseabed location into the superadjacent high

110 See OCSLA Section 1333a(1)
111 The OCSLA House Conference Report made clear its intention that “[f]ederal law is to be applicable to all activities on all devices in contact with the seabed for exploration, development, and production. Conf. Rep. No. 1474, 95th Cong., 2d Sess. 80, reprinted in 1978 U.S. Code Cong. & Ad. News 1450, 1679 (emphasis added).
112 See President’s Report at p. 130 (rig’s oil) and 167 (BP well oil).
113 Offshore Co. v. Robison, 266 F.2d 769, 779 (5th Cir. 1959).
seas and state territorial waters. OCSLA Section 1332(2) states that "this subchapter shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas ... shall not be affected."\(^ {114} \) Even this claim is not necessarily conclusive, however. Congress included this language to safeguard the nation's well-known commitment to the international freedom of the seas, not to complicate a straightforward OCSLA/OPA OCS-to-shore (and inland) control program by segmenting jurisdiction over the oil between admiralty and other sources of federal jurisdiction or, for that matter, between the federal and state governments.

Hence, the next BP question. On what basis will OPA's liability for damages suffered inland of the coastline of the affected states' coastlines be grounded? The ready answer would seem to lie in the Admiralty Extension Act.\(^ {115} \) In stating that damage must be "caused by a vessel on navigable water,"\(^ {116} \) however, this option plunges us back into the uncertainties of the section's introductory issue. Would the courts be willing in any event to paste an admiralty tail on a spill emanating from an OCS location, particularly if, as may be speculated, OPA is deemed to supersede the general maritime law respecting any matter to which OPA directly speaks?

A simpler pathway that avoids these complications is suggested in the pragmatic, purpose-driven reasoning of \textit{Slaven v. BP America, Inc.}\(^ {117} \) \textit{Slaven} arose under the Trans-Alaskan Pipeline Authorization Act (TAPAA),\(^ {118} \) which addresses spills of oil occurring at any point beginning with Alaska's North Slope, where the oil is drilled, through a pipeline to Port Valdez for the loading of oil tankers, which, in \textit{Slaven}, transported the oil to a mooring station in California for transfer to lightering ships, which offloaded the oil at port terminals.\(^ {119} \) After arriving at the station, the \textit{Slaven} tanker transferred its oil to the lightering ship, which spilled the oil on its way into the port terminal.

\(^ {114} \) This solution was chosen in \textit{Union Oil Co. v. Oppen}, 501 F.2d 558 (9\(^ {th} \) Cir. 1974), which dealt with a complaint brought by commercial fishermen against an oil company following the 1969 Santa Barbara OCS well blowout. The court ruled that the oil's migration to superadjacent waters took the matter from OCSLA's coverage, and brought into play either or both maritime law and true California state law. \textit{Id.} at 559-61. Although the only OCS blowout case my research has located, it may prove to be of limited value as a precedent today in view of the subsequent passage of the 1978 OCSLA amendments and the 1990 Oil Pollution Act. Unlike the BP scenario, moreover, it was a ship-to-sea not a ship-to-shore (and beyond) case.

\(^ {115} \) 46 U.S.C.A. Sec. 740.

\(^ {116} \) \textit{Id.} (emphasis added).

\(^ {117} \) 973 F.2d 1468.

\(^ {118} \) 43 U.S.C.A 1651 et seq.

\(^ {119} \) Like OCSLA's 1978 Title III, in fact, TAPAA's scheme was significantly incorporated into OPA upon that statute's enactment.
The TAPAA Fund refused the resulting spill claim on the ground that its liability extended only to spills from the Valdez oil tanker, not from the discharging vessel. The court candidly acknowledged that the Fund’s position squared with the text of a TAPAA provision, but rejected it nonetheless.

The difficulty with the Fund’s position is that it asks this court to apply one reading of a particular subsection in isolation from the rest of the statute. As a tenet of statutory construction, however, the plain language rule does not examine statutory words in a vacuum. Rather, courts must consider a statutory provision’s phraseology in light of the overall structure and purpose of the legislation.

The structure of TAPAA ... favors an interpretation of the statute’s language where strict liability follows the oil rather than the vessel. Other provisions of the statute link liability to virtually every aspect of the oil’s movement across land. Subsection (c) (7), when read in this light, indicates a similar congressional intent to cloak the entire marine leg of the transportation system with absolute liability.120

Perhaps similar common sense, statutory goal driven reasoning will prove attractive to BP courts as a way of resolving the rig/well, OCS/ambient water, federal/state dichotomies that so complicate the BP oil spill scenario. Occam’s razor has a place in legal reasoning, no less than in theological discourse.

IV. Conclusion

The body of this paper’s orientation, like OPA itself, is toward the past rather than toward the future. OPA too looked to the past, not to the future. The Exxon Valdez disaster conditioned Congress to focus principally upon vessel-based oil spills occurring in state territorial waters. Unwisely, I believe, Congress disassociated OCSLA’s 1978 Title III amendment, with its liability and compensation requirements carefully tailored to the OCSLA’s OCS regulatory requirements, from those requirements, moving them in more generalized form to the then-new OPA. I believe Congress erred in doing so, and I would offer the rampant uncertainties identified throughout this paper in support of this judgment.

The President’s BP Commission Report no less than the BP catastrophe itself leave no doubt in my judgment that OCS blowouts and spills merit independent treatment that engages their distinctive characteristics, confronts the severity of their character as the environmental problems they truly are, and that aligns the remedial and procedural component of a liability and compensation process with the regulatory priorities that ought to be driving this component.

120 Id at 1473-74 (emphasis added).
I don’t believe that we have a framework of this nature in place today. Consider again how many open jurisdictional and functional questions accompany the movement of the BP gusher from its home in the OCS’s sub-seabed all the way into the coasts of the Gulf states and, in its consequences, all the way, I suppose, to the Chicago restaurateur who loses patrons because they can’t get their Louisiana crawfish.

Perhaps this paper’s inquiry may stimulate not only appropriate judicial responses under the current law, but thoughtful Congressional reconsideration of where we go from here.